# In the
# Supreme Court of the United States

OCTOBER TERM, 1975

**No. 75-1356**

REV. HERMAN L. DRISKELL, THOMAS R. TRAINER AND ROBERT L. MURPHY,

Appellants,

v.

HONORABLE EDWIN W. EDWARDS, GOVERNOR, STATE OF LOUISIANA; HONORABLE WADE O. MARTIN, JR., SECRETARY OF STATE, STATE OF LOUISIANA; HONORABLE MARY EVELYN PARKER, TREASURER, STATE OF LOUISIANA; AND HONORABLE DOUGLAS FOWLER, STATE CUSTODIAN OF VOTING MACHINES, STATE OF LOUISIANA,

Appellees.

## APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA

## MOTION TO DISMISS OR AFFIRM

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April 12th, 1976

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## MOTION TO DISMISS OR AFFIRM

Appellees, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move the Court to dismiss the appeal herein or, in the alternative, to affirm the final judgment and decree of the District Court on the ground that it is manifest that the questions on which the cause depends are so unsubstantial as not to need any further argument.

## STATEMENT

This is a direct appeal from the final judgment

and decree entered on January 15, 1976, by a District Court of three Judges, specially constituted pursuant to 28 U.S.C. 2281 and 2284, dismissing appellants' complaint.[1]

No evidence was taken in this case. At the request of the Court below, the following joint stipulation of facts was filed on the 15th day of September, 1975:

> "By Act 2 of 1972, the Louisiana Legislature provided a procedure for calling and holding a constitutional convention. The act provided for the election of 105 delegates to the convention, being one each from the districts from which members of the House of Representatives of the Louisiana Legislature were elected at their last election for members of that body. Additionally, one delegate was to be appointed by the Governor to represent each of the following: industry, labor, education, civil service, wildlife and conservation, law enforcement, the judiciary, the professions, consumers, agriculture, youth and racial minorities; and fifteen delegates were to be appointed by the Governor from the public at

[1] In the words of Chief Judge John R. Brown, United States Court of Appeals, Fifth Circuit, "This [is a] much-traveled case." Its journey is—Driskell et al v. Edwards et al, 374 F Supp 1, W.D. LA. (April 10th, 1974); United States Supreme Court A.999 (April 19th and 24th, 1974); 419 U.S. 812 (October 15th, 1974); C.I. 74-339 [unreported] W.D.LA. (November 5th, 1974); 518 F.2d 890 C.A.5, (September 5th, 1975); 74-339 W.D.LA. [unreported] [three judge District Court] (January 15th, 1976.) The journey for its companion was shorter. Bates et al vs. Edwards et al, 249 So.2d 532, S.C.LA. (April 3rd and 5th, 1974); 419 U.S. 811 (October 15th, 1974)



large. The qualifications required that each delegate be an elector of the State of Louisiana. The elected delegates were to be residents of the district from which they qualified as a candidate. Having been declared emergency legislation, the act became effective on May 26, 1972.

"Upon the completion of the usual qualifying, campaigning, elections and run-off elections, the 105 delegates chosen by the people joined with the 27 delegates appointed by the Governor and conducted convention proceedings for 122 days between January 5th, 1973 and January 19th, 1974. [During this same period, 4 delegates were appointed by the Governor to replace elected delegates who had resigned for one reason or another.]

"After standing mute for almost two years during the happening of the foregoing events, plaintiffs filed these proceeding on Friday, April 5th, 1974, two weeks before the election on the proposed constitution was to be held.

"Defendants, on the same day this suit was commenced, moved for an order denying the application for a three judge court because of the insubstantiality of the federal questions, and moved for a summary judgment. [An answer was also filed due to the critical time factor involved.]

"The district court, after a hearing thereon, granted each of defendants' motions. Plaintiffs' application for injunction was denied by Justice Powell [A999]. (On April 19, 1974, the following message was sent: '5045379275 TDBN Baton

Rouge La. 25 04–19 0529P EDT PMS Justice William O'Douglas, *(sic)* DLR US Supreme Court Washington DC 20543 Urgent. Please review Rev Driskell etal versus Edwards etal A999 and issue in junction. Imperative before Saturday to avoid loss of my clients constitutional rights. Jerry Finley Attorney.' On April 23, 1974, the following message was sent: 'PMS Mr. Blondell, Clerks Office U S Supreme Court Washington DC 20543 Refer Rev Driskell et al versus Edwards et al to Justice Douglas Jerry Finley attorney,' across the face of which is inscribed: 'Application Denied WOD 4/24/74.') The election was held on April 20th, 1974, with the following results:

"Adoption of the Proposed 1974 Constitution

| | |
|---|---|
| For | 360,980 |
| Against | 262,676 |

This constitution provides for the continuation of many of the provisions of the 1921 constitution as statutes.

"Plaintiffs then filed a jurisdictional statement with the United States Supreme Court.

"Defendants filed a motion to dismiss or affirm contending that mandamus to convene a three judge court is the appropriate remedy to protect the prospective jurisdiction of the Supreme Court, not by appeal, and that the appeal relative to the summary judgment should be to the Court of Appeals. On October 15th, 1974, the Supreme Court vacated the judgment of the district court and remanded the case to the United States District Court for the Western



District of Louisiana with directions to issue a fresh decree from which a timely appeal could be taken. Plaintiffs' notice of appeal to this Court was filed with the District Court on November 29, 1974. Defendants then filed a motion to expedite appeal to which plaintiffs consented. The motion was granted.

"After argument, both oral and in writing, the United States Court of Appeals, 5th Circuit, on September 5th, 1975, vacated and remanded this case to the District Court and, simultaneously therewith, convened a three-judge District Court."

## ARGUMENT

### THE MOTION TO DISMISS SHOULD BE GRANTED.

"* * * when a three-judge court denies a plaintiff injunctive relief on grounds which, if sound, would have justified dissolution of the court as to that plaintiff, * * * review of the denial is available only in the court of appeals."

*Gonzalez v. Automatic Employees Credit Union*, 419 US 90, 101. (1974)

### THE MOTION TO AFFIRM SHOULD BE GRANTED.

The decision of the District Court is plainly correct.

By the first question presented, appellants suggest that the appointment of twenty seven delegates casts constitutional doubt on the validity of the proceedings by which Louisiana's constitution was

framed. The "one man, one vote" principle had its inception in *Baker v. Carr*, 369 U.S. 186, (1962). Since that time it has been applied to congressional elections, *Wesberry v. Sanders*, 376 U.S. 1 (1964); state legislatures, *Reynolds v. Sims*, 377 U.S. 533 (1964); local government elections, *Avery v. Midland County*, 390 U.S. 474 (1968); and to school districts, *Hadley v. Junior College District of Metropolitan Kansas City, Missouri*, 397 U.S. 50 (1970). It does not apply to the judiciary, *Wells v. Edwards*, 347 F.Supp. 453 (M.D. La. 1972), affirmed 409 U.S. 1095 (1973).

*Hadley v. Junior College District*, supra, sets forth a general rule as to when the "one man, one vote" principle applies. The court stated at 397 U.S. 50, 56:

> "* * * We therefore hold today that as a general rule, whenever a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election and when members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials * * *"

What are governmental functions? The court in *Wells v. Edwards*, supra, stated at page 455:

> "* * * But in Hadley, as in every other case that we can find dealing with the question of apportionment, the 'governmental functions' involved related to such things as making laws, levying and collecting taxes, issuing bonds, hiring and firing personnel, making contracts, collecting fees, operating schools, and generally managing and governing people. In other words, apportionment cases have always dealt with elected officials who performed legislative or executive type duties * * *."



Louisiana's constitutional convention had no power to make laws, levy taxes or enforce laws. It simply framed, for submission to the people, a proposed constitution. The delegates performed no legislative or executive type duties and were, therefore, not subject to the teachings of *Baker v. Carr*.

The apportionment cases do not establish the right to vote on every official who holds public office or performs a public function. In *Sailors v. Board of Education of the County of Kent*, 387 U.S. 105 (1967), the court at 110, declared:

> "Viable local governments may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions. We see nothing in the Constitution to prevent experimentation. At least as respects nonlegislative officers, a State can appoint local officials or elect them or combine the elective and appointive systems as was done here * * *."

[Cf. *West v. Carr*, 212 Tenn. 367, 370 S.W. 2d 469, cert. denied 378 U.S. 557 (1964); and *Stander v. Kelley*, 403 Pa. 406, 250 A 474, cert. denied, *sub nom. Lindsay v. Kelley*, 395 U.S. 827. (1969)]

The *Sailors* decision followed by two years the

*Fortson* decision wherein Justice Harlan, as joined by Justice Stewart, had this to say:

> "As to the provisions forbidding submission to the electorate of a legislatively proposed new state constitution, I can find nothing in the Fourteenth Amendment, elsewhere in the Constitution, or in any decision of this Court, which requires a State to *initiate* complete or partial constitutional change only by some method in which every voice in the voting population is given an opportunity to express itself. Can there be the slightest constitutional doubt that a State may lodge the power to initiate constitutional changes in any select body it pleases, such as a committee of the legislature, a group of constitutional lawyers, or even a 'malapportioned' legislature—particularly one whose composition was considered, prior to this Court's reapportionment pronouncements of June 15, 1964, to be entirely and solely a matter of state concern?[3]
>
> "* * *
>
> [*Fortson v. Toombs*,
> 379 U.S. 621, 626.
> (1965)
> Concurring in part,
> Dissenting in part]

[3] If, as I believe, a State is not federally restricted in its choice of means for initiating constitutional change, the question of whether, under Georgia law, the proposed new Georgia Constitution should have been initiated by a popularly elected convention instead of by the legislature is not a matter for federal cognizance."



By their second question presented, appellants suggest that Louisiana no longer has a republican form of government. By the Act of Congress of the 8th of April, 1812 [2 U.S. Stat. 701], Louisiana was admitted into the Union "on an equal footing with the original states in all respect whatsoever." The enabling Act [2 U.S. Stat. 641] was superseded by the Louisiana State Constitution of 1812. *Permoli v. Municipality No. 1 of the City of New Orleans* 44 U.S. (3 How.) 589 (1845). Four years later this Court, in discussing the Fourth Section of the Fourth Article of the Constitution of the United States, declared:

> "Under this article of the Constitution it rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal."
>
> *Luther v. Borden*
> 48 U.S. (7 How.) 1, 42.
> (1849)

Thus, whether Act 2 of 1972 violates §4 of Article 4 of the Constitution of the United States is not a

judicial but a political question committed to Congress. *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1916).

## CONCLUSION

Appellees respectfully urge this Court to dismiss this appeal or, in the alternative, to affirm the decision of the Court below.

Respectfully submitted,

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